MOTION FILED
JUN 27 1983

No. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND

BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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June 1983

Pandick Press Midwest, Inc., Chicago • 454-7600

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Motor Vehicle Manufacturers Association of America, Inc. ("MVMA") respectfully moves, pursuant to rule 36.3 of the Rules of the Court, for leave to file a brief *amicus curiae* in this case in support of respondents. Respondents' counsel has consented to the filing of this brief but petitioner's counsel has not.

The brief which the MVMA wishes to file in this case supplements the brief it has, with leave of Court, filed as *amicus* in No. 82-1127, *Helicopteros Nacionales de Columbia* v. *Hall*. As in that case, the concern of the Association and its members—and, no doubt, of all other corporations doing a nationwide business—is that litigation should be brought in a forum which has a substantial relation to the controversy and the

parties. This case presents the question whether suit can be brought in a jurisdiction which has the longest statute of limitations, even though its relationship to the controversy and the parties is, at most, insignificant.

That problem also is present in the still pending action against an MVMA member in which a panel of the Fifth Circuit has held that suit can be brought in a forum chosen solely to escape the bar of the statute of limitations of the only state having any relation to the controversy. *Cowan* v. *Ford Motor Company*, 694 F.2d 104 (5th Cir., 1982), suggestion for rehearing *en banc* pending.* In that case, selection of the forum with the longest limitation period was permitted even though the forum's only "contact" with the case was that the defendant corporation had engaged in local business completely unrelated to the controversy and had designated an agent to accept service of process as required by state law, as it has done in all fifty states.

Although the cases are distinguishable, the grounds on which the Court decides the instant case may well determine whether corporations engaged in business nation-wide will be subject to suit on any claim in the state with the longest statute of limitations, no matter how slight its relationship to the case or the parties or how inconvenient that will be for all the parties and the trial court.

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* In the *Cowan* case the Fifth Circuit has requested the parties to file supplemental briefs.

As in *Helicopteros*, the MVMA believes that it is uniquely qualified to explain the significance to national corporations generally of the issues presented and the Court's disposition of them. It therefore respectfully requests leave to file a brief *amicus curiae*.

Respectfully submitted,

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BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Motor Vehicle Manufacturers Association ("MVMA") is a trade organization that includes the nation's principal manufacturers of motor vehicles. Members of the MVMA distribute their products in every state in the union. They have a direct interest in urging this Court to affirm that corporations engaged in business throughout the nation shall not be suable on any subject in the state with the longest statute of limitations, no matter how unrelated their activities in that state may be to the plaintiff or the subject of the litigation. Their concern is not academic, as appears from the adverse decision of the Fifth Circuit in *Cowan* v. *Ford Motor Co.*, 694 F.2d 104 (1982), suggestion for rehearing *en banc* pending.

SUMMARY OF ARGUMENT

In determining whether a state court's exercise of jurisdiction or choice of law violates the Due Process and Full Faith and Credit Clauses, this Court has indicated in a number of recent decisions, most notably *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981), *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), and *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), that the Constitution protects a defendant against a plaintiff's unfair choice of a forum and prevents a state from assuming jurisdiction over a case when to do so would improperly impinge on the interests of one or more other states.

We submit that when, as in this case—and even more clearly in the more typical single-state tort case—suit is brought in a state having no substantial connection with the parties or the tort for the sole purpose of obtaining a more favorable statute of limitations, the contacts are insufficient either to support the jurisdiction of the forum state or to justify application of its law.

a. In such circumstances careful analysis of the forum state's contacts and interests is required before applying its statute of limitations, even though, for other purposes, such statutes often have been classified as procedural. That classification does not override the mandate of the Due Process and Full Faith and Credit Clauses, which require invalidation of "the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests with the parties and the occurrence or transaction." *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 308, 332 (1981).

A forum state may have a procedural interest in safeguarding its courts against stale litigation and in protecting parties against long-delayed claims by applying its own *shorter* statute of limitation. But the forum has no legitimate interest, procedu-

ral or otherwise, in reviving a cause of action after it is dead in the state which created it through application of the forum's *longer* limitation period.

Nor should the forum's statute of limitations govern merely because the defendant does some unrelated business there or has appointed an agent to accept service. Most national companies do that in every state, and often in many other countries. In the absence of other substantively relevant contacts, no state has a legitimate interest in having its law apply to everything a corporation does throughout the nation or the world. That would invite forum-shopping on a grand scale.

b. The small proportion (less than one percent) of the distribution of respondents' publication in New Hampshire is not a sufficient ground for subjecting respondents to suit in New Hampshire for damages resulting from the distribution of their publication in all the other states in which the period of limitation has expired. To do so not only would effectively nullify the policy of the 49 states whose statutes of limitations have expired, but also would unfairly expose respondents to liability for damages contrary to their reasonable expectation of repose. In any event, in the more typical tort cases with which the members of the MVMA are concerned, which arise only in one state, the mere fact that the defendant conducts some business unrelated to the cause of action is not in itself a sufficient contact to warrant subjecting it to suit in such a state or to that state's law.

This Court should not permit companies which do business throughout the nation to be sued in all types of cases in the state having the longest statute of limitations when that state has no substantial relation to the contr[illegible]ersy or the parties.

ARGUMENT

THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSES FORBID A FORUM STATE FROM EXERCISING JURISDICTION OVER OR APPLYING ITS LAW TO A CASE WITH WHICH THE FORUM STATE HAS NO SUBSTANTIAL CONTACTS

In this case and cases such as *Cowan* v. *Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982), in which the members of the MVMA have an interest, subjecting defendants to the longer statute of limitations of a forum state presents two questions under the Due Process and Full Faith and Credit Clauses which, though different, to a large extent overlap:

1. Whether the trial court has personal jurisdiction over the defendant, and

2. Whether the law of the forum can apply to transactions and parties which have no, or at most slight, connection with the forum state.

This Court has applied the minimum contacts test to both issues. The opinions of Justices Brennan and Powell in *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 308, 317, n.23, 332 (1981), appear to be in accord as to this. The Court also seemed to agree that although "examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes," "both inquiries, 'are often closely related and to a substantial degree depend upon similar considerations'" (*id.* at 317, 320-321).[1]

In *Allstate*, the plurality and the dissenting opinions (449 U.S. at 308, 332) agreed that

> "in deciding constitutional choice-of-law questions . . . this Court has traditionally examined the contacts of the State,

[1] Justice Stevens similarly stated that "[a]lthough the choice-of-laws concerns—respect for another sovereign and fair play necessary to the litigants—are similar to the two functions performed by the jurisdictional inquiry, they are not identical." (*Id.* at 320-321, n.3).

> whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation . . .."

Thus the lesson from prior cases on choice of law is:

> "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." (*Id.* at 312-313, 332).

Indeed, within a year of *Allstate*, this Court affirmed a decision of the Eighth Circuit which, after reviewing the authorities, declared:

> "When a state's law is applied to a transaction with which the state has no significant contact, it infringes upon the legitimate interests that other states may have in the transaction; this infringement is not reasonable—in a due process sense—within the context of our federal system of government."

McCluney v. *Schlitz Brewing Co.*, 649 F.2d 578, 582 (C.A. 8, 1981), affirmed, 454 U.S. 1071 (1981).

World-Wide Volkswagen v. *Woodson*, 444 U.S. 286, 291-292 (1980), adopted a similar approach in analyzing *in personam* jurisdiction:

> "The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."

These decisions follow *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-319 (1945), and *Shaffer* v. *Heitner*, 433 U.S. 186, 203-204 (1977), in holding that personal jurisdiction over a defendant requires that the defendant have minimum contacts with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

> "[T]he inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was 'present' but on whether there have been 'such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.'" • • •
>
> "'Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.'
>
> "Thus, the relationship among the defendant, the forum and the litigation . . . became the central concern of the inquiry into personal jurisdiction." (433 U.S. at 204).

With respect to both personal jurisdiction and choice-of-law issues, the Court has emphasized that it is concerned both with protecting a defendant "against the plaintiff's unfair choice of a forum" and "preventing a State from taking jurisdiction of a case when to do so would improperly impinge on the interests of one or more of the states."[2]

The nature of these two concerns suggests that, although the same factors are considered, greater weight should be given to the unfairness to the defendant when the issue is whether the Court has personal jurisdiction, but to reasonableness in the context of our federal system of government when the issue is whether a State can apply its law to a case with which it has little contact.[3]

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[2] W. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1589 (1978).

[3] Shaffer v. *Heitner*, 433 U.S. 186 (1977), *Hanson* v. *Denckla*, 357 U.S. 235, 253-254 (1958), and *Kulko* v. *California Superior Court*, 436 U.S. 84, 92, 98 (1978) demonstrate that the relevant

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Professor Reese, who was the Reporter for *Restatement (Second) of Conflict of Laws*, concludes that, although this Court has not explicitly so declared, an analysis of its opinions indicates "that whereas considerations of fairness to the parties have been emphasized in the area of judicial jurisdiction, greater weight has been accorded federal (or international) system values in the case of legislative jurisdiction."[4] He subsequently observed:[5]

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factors are not necessarily given the same weight in passing upon personal jurisdiction and choice-of law. *Shaffer* declared that the Court has "rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute" (433 U.S. at 215). In order to justify subjecting a defendant to a forum's jurisdiction, there must be some substantively relevant action of the defendant in the forum which makes it "reasonable" and "fair" to require him to defend himself there. *Kulko*, 436 U.S. at 92, 98.

[4] W. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1593 (1978). Professor Reese has characterized "the power of a state to apply its law to create or affect legal interests" as "legislative jurisdiction," in contrast to the "judicial jurisdiction . . . of a state to try a case in its courts." (*Id.* at 1587).

While recognizing that this Court has not yet attempted to define "legislative jurisdiction," Professor Reese suggests that:

> "Inasmuch, however, as the same constitutional provision governs both judicial and legislative jurisdiction and the same general considerations apply to both, it should follow that the same basic principle underlies both areas. In other words, it is suggested that the principle for determining questions of legislative jurisdiction is whether it would be reasonable in the context of our federal system of government for the state in question to apply its law in the particular case. • • •
>
> "As in the case of judicial jurisdiction, application of this principle to the question of legislative jurisdiction would involve a twofold test; whether application of the law of the particular state to the point at issue would be fair to the parties and also consistent with the needs of the federal (or international) system." (*Id.* at 1592.)

[5] W. Reese, *The Hague Case: An Opportunity Lost*, 10 Hofstra L. Rev. 195, 201 (1981).

> "The Supreme Court has recently held that federal-system values must be considered in determining whether a state has jurisdiction under due process to hear a case in its courts. There is good reason for supposing that these values should play an even more significant role when it comes to assessing the propriety of a court's choice of law. Surely, a state's interests are more likely to be affected by the application of a foreign law to determine the rights of the parties than when the court of another state simply entertains the case."

We submit that when, as in this case—and even more clearly in the typical single-state tort cases with which national business enterprises are most often concerned—suits are brought in states having no substantial connection with the parties or the tort for the sole purpose of obtaining a more favorable statute of limitations, the contacts are insufficient either to support the jurisdiction of the forum state or to justify application of its law.

(a) The statute of limitations of a forum state having no substantial connection with the matter in litigation should not be controlling.

The decision of the court of appeals should be affirmed because there is no reasonable basis for applying the statute of limitations of a state having no connection with a defamation claim except the distribution of less than one percent of the defamatory material within its borders, particularly when the object of the suit includes the collection of damages for the effect of the publication in the forty-nine other states whose statutes of limitations have expired.[6]

Even more plainly, when a tort occurs in a single state other than the forum, there is no reasonable basis for applying the longer statute of limitations of a forum having no connection at all with the tort, the injury resulting therefrom, or the plaintiff. This is the situation in the cases with which the members of the MVMA are concerned.

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[6] Petitioner brought suit in New Hampshire "which, she says, is the only state remaining in which the statute of limitations has not run." (Pet. App. 13a).

To be sure, statutes of limitations often have been said to be "procedural" and thus subject to the law of the forum (*e.g.*, *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953)), even though, as a practical matter, they are outcome-determinative and substantive.[7] But that method of classification for other purposes does not override the constitutional principle that invalidates "the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 308, 332 (1981). A constitutional doctrine directed at practical problems should not become inapplicable merely because a statutory provision has been labeled procedural rather than substantive.

This Court repeatedly has rejected such conclusory characterizations. In *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 405-406 (1930), a State's attempt to classify a one-year contractual limitation provision as procedural did not make it any less unreasonable for the State to ignore that limitation when forum contacts with the underlying controversy were lacking.[8] See also *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U.S. 178, 181-182 (1936).

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[7] Most modern scholars agree that "there is little reason for this rule [treating statutes of limitations as procedural] other than historical," which may be traceable to the antipathy of the English courts 200 years ago toward reliance on foreign law. H. Goodrich, *Conflict of Laws* 152 (4th Ed. 1964). "As applied to causes of action barred where they arose, [this] does not make very good sense." Leflar, *American Conflicts Law* 253 (3rd Ed. 1977); H. Lorenzen, *The Statute of Limitations and The Conflict of Laws*, 28 Yale L. J. 492, 496-497 (1919) ("no reasons" nor "any policy" supports enforcement of "a foreign cause of action which is barred by the law governing the substantive rights of the parties").

[8] Cf. *Verlinden B.V.* v. *Central National Bank of Nigeria*, 51 U.S. Law Week 4567, 4572 (May 23, 1983), in which the fact that an "inquiry into foreign sovereign immunity is labeled under the Act as a matter of jurisdiction" did not limit the constitutional power of Congress to regulate the subject.

The leading commentators agree that this type of labeling is not a substitute for constitutional analysis. A forum state should not be permitted to extend the life of a tort action which is barred by the statute of limitations of the only state with significant contacts with the litigation. As Professor Leflar has stated (*American Conflicts Law*, § 61 at 120 (3rd. Ed., 1977)):

> "Difficult questions are encountered. . .when issues that may be outcome-determinative, such as. . .statute of limitations (which determines whether any action may be brought) are characterized as procedural. *Home Ins. Co.* v. *Dick* and *John Hancock Mut. Life Ins. Co.* v. *Yates* warn us that a forum's procedural characterization can go too far. It goes too far not because of any technical rule of characterization, but for the same 'fair play and substantial justice' reasons that make it unconstitutional when any court deprives any person of his life, liberty, or property by applying a law which has so little substantial connection with the issues in his case as to make the application an unreasonable one." (Footnotes omitted.)

> "There is no inherent reason why the choice between statutes of limitations should be handled any differently than other choice-of-law problems." *Id.* at 256.

Professor Weintraub similarly has observed (*Commentary on the Conflict of Laws*, § 9.2B at 517 (2d Ed., 1980)):

> "it seems highly unreasonable for a forum that has no significant contact with the controversy to employ its own longer statute to extend the limitations period. Such conduct serves no substantial interest of the forum . . . . Application of the forum's longer limitation period results in a judgment on the merits different from the judgment that could have been obtained in the jurisdiction with which the controversy is most closely connected. A state ought not be able to apply its own law to a case on the sole ground that the law applied is 'procedural' if application of forum law advances no relevant forum policy and if application of the relevant foreign rule would not be unduly burdensome on the forum when measured against the likelihood that failure to apply the foreign rule will change the outcome of the litigation." (footnotes omitted).

The *Wells* case, in which only full faith and credit contentions were presented, spoke generally in asserting that the forum state could enforce its own statute of limitations. But its holding was that the forum could apply its own *shorter* statute of limitations. That this was the Court's concern is shown by its quotation from the *Restatement of Conflicts of Laws*, § 603 (1934), and *Order of United Commercial Travelers* v. *Wolfe*, 331 U.S. 586, 607 (1947), for:

> "...the well-established principle of conflict of laws that 'If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose' ". 345 U.S. at 516-517.

That is, the forum is free to apply its own shorter period of limitations. This protects the forum state's procedural interest in safeguarding its courts against stale litigation and faulty memories and in protecting parties against long-delayed claims. Professor Martin has aptly stated in relation to *Wells:*

> "The procedural interest that can justify Pennsylvania in giving a shorter lifetime than Alabama affords to an Alabama cause of action cannot possibly justify Pennsylvania in giving it a longer life. Realistic situations in which the interest of a state are served by sustaining a cause of action longer than the state which created it are highly unlikely. One might therefore suggest a simple constitutional rule with respect to the statutes of limitations in cases where the forum has no substantive interests: The forum may be justified in using its own statute of limitations to bar a cause of action that is still good in the state which created it, but a state should be forbidden from entertaining a cause of action after it is dead in the state which created it."[9]

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[9] J. Martin, *Constitutional Limits on Choice of Law*, 61 Cornell L. Rev. 185, 221 (1976). To the same effect, see R. Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. Rev. 813, 846-850 (1962).

Thus it is "hard to justify the forum's entertainment of a case that would be barred by the only substantively interested jurisdiction, even if the common law would justify the result by calling the limitations rule a 'procedural' one." Martin, *supra*, at 223. As previously noted, the Court in *Wells* permitted the forum to apply its own shorter period of limitations: it did not permit the forum to revive "a cause of action after it is dead in the state which created it."

That is precisely what petitioner in this case is seeking to do. Her cause of action was dead not only in the States (Ohio and New York) which had the most significant contacts with respondents' alleged defamation and with herself, but also in every other state except New Hampshire.

Even if the distribution of Hustler Magazine in New Hampshire should be regarded as creating a significant relationship between the subject matter of the litigation and that State, that would not be true in cases in which there was no such relationship. The forum's longer statute of limitations should not govern in such circumstances merely because the defendant does some unrelated business in the forum or has appointed an agent to accept service. Most national companies do business and have appointed an agent in every state in the union, and often in many other countries. In the absence of contacts other than these universal ones, no state has a legitimate interest in having its law apply to everything a corporation does throughout the nation or the world. In the words of Justice Powell in *Allstate* (449 U.S. 337), "the invitation to forum-shopping would be irresistible."[10] In contrast to *Allstate*

[10] In view of this concern, a substantial number of states have enacted "borrowing statutes," by which the forum adopts the statute of limitations of the jurisdiction having substantial contacts with the cause of action. *See, e.g., Order of United Commercial Travelers* v. *Wolfe*, 331 U.S. 586, 607 (1947) ("These numerous 'borrowing statutes' demonstrate the general recognition of the sound public policy of limiting, under some circumstances, the application of the

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(see plurality opinion, p. 319), the only reason for suing in the forum here (and in the *Cowan* case) was to take advantage of its more favorable statute of limitations.

(b) Respondents' contacts with New Hampshire are not sufficient to subject them to the jurisdiction of New Hampshire courts.

The reasons why subjecting respondents to the jurisdiction of the New Hampshire courts is not fair and reasonable are fully set forth in the Brief for Respondents. In addition, the legal principles governing *in personam* jurisdiction are discussed in detail in our *amicus* brief in the *Helicopteros* case. Accordingly that analysis will not be repeated here.

We wish to emphasize, however, that the court of appeals correctly took petitioner's forum shopping activities into account when applying the Due Process Clause to the issue of *in personam* jurisdiction. See Pet. App. 17a-19a. The Due Process Clause prevents a trial court from exercising jurisdiction when it would be fundamentally unfair to do so. In the present case, petitioner permitted her cause of action to expire in 49 states. Yet she now seeks to impose liability upon respondents stemming from distribution of their products in all 50 states. This not only would effectively nullify the policy of the 49 states whose statutes of limitations have expired, but also would unfairly expose respondents to liability for damages contrary to their reasonable expectation of repose.

As the court of appeals notes, the major factor supporting resort to a New Hampshire forum is that a small portion (less than one percent) of respondents' publication was distributed

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general statute of limitations of the state of the forum. The full faith and credit clause, applied, as in the present case, is but another limitation voluntarily imposed, by the people of the United States, upon the sovereignty of their respective states in applying the law of the forum").

in New Hampshire. Pet. App. 15a. In that respect, this case differs from *Helicopteros* (No. 82-1127), as well as cases such as *Cowan* v. *Ford Motor Co.*, in which the tort and the injury to the plaintiff did not occur in a large number of states. This case would resemble the more typical tort cases if respondents' only connection with New Hampshire had been that they distributed in that State less than one percent of the copies of a magazine which did *not* contain the alleged libel. Even though that proportion of their unrelated business might produce substantial revenues, such business activities unquestionably should be insufficient to warrant subjecting publications that were not distributed in New Hampshire to New Hampshire law. Likewise, a personal injury claim against a manufacturer should not be governed by the law of a state in which the plaintiff did not reside and the injury did not occur merely because the defendant sold unrelated products there.

The object of this brief is to make the Court aware of the possible impact of cases such as this upon all corporations doing business in many or all states. The Court should not, we submit, permit such companies to be sued on any cause of action in the state having the longest statute of limitations when that state has no substantial relation to the controversy or the parties.

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

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